S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BOND CONSTRUCTION COMPANY, Plaintiff-Appellee,	UNPUBLISHED August 13, 1999
v	No. 210130 Kent Circuit Court
CHARLES MORGAN and RICHARD MORGAN, d/b/a MORGAN BROTHERS CONSTRUCTION, and CONTINENTAL CASUALTY COMPANY, Defendants-Appellants.	LC No. 96-008387 CZ

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment in favor of plaintiff. We affirm. Furthermore, we find defendants' appeal to be vexatious and therefore remand to the trial court for an award to plaintiff of actual damages and expenses, including reasonable attorney fees, incurred as a result of defendants' appeal.

I

Defendants contend that the trial court erred in awarding compensation to plaintiff under the equitable doctrine of quantum valebant when an express written contract covering the same subject matter existed between the parties. When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). A trial court's findings of fact are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

Defendants correctly note that an implied contract will not be found where there is an express contract covering the same subject matter. See *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). However, this rule does not apply where recovery is sought for goods not contemplated in the original contract. *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976).

In the instant case, the contract contained the following provision: "All sand fill for fills, trenches and sand sub-base to be available from on-site source." Defendants assert that through this provision the parties, "in effect, agreed that Bond would not be compensated for any sand that they might bring in from off the site." We disagree. Giving the contractual language its ordinary and plain meaning, *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998), it is clear that the parties' contract did not contemplate the need to acquire sand from off-site sources. Thus, when the on-site sand proved insufficient to complete the project, the situation was not covered by the parties' contract. See *Cascade Electric Co*, *supra*.

"The existence of a contract implied in law under a quantum valebant count depends upon whether the defendant 'has used for its benefit any property of [plaintiff] . . . in such manner and under such circumstances that the law will impose a duty of compensation therefor.'" *Lake v Wyatt Earp Enterprises, Inc*, 210 Cal App 2d 366, 370; 26 Cal Rptr 683 (1962), quoting *Weitzenkorn v Lesser*, 40 Cal 2d 778, 794, 256 P2d 947 (1953). Here, Gerald Feenstra testified that he was defendants' representative on the project and that he had known that sand had to be obtained from outside sources in order to complete the project according to city requirements. Defendant Charles Morgan testified that he had an outstanding loan of $660,000 on the project, and he would not have allowed the project to fail for lack of sand. The trial court found that defendants had been aware that off-site sand was being brought in, that by their silence they assented to it, and that it was foreseeable that they would be charged for the sand. These findings are not clearly erroneous. See *LaFond*, *supra*. Accordingly, the trial court properly found that plaintiff was entitled to compensation for the sand in order to prevent defendants from being unjustly enriched at plaintiff's expense.

II

Next, defendant contends that the trial court awarded plaintiff more than the cost of the necessary sand. Recovery under the quantum valebant theory must be limited to the reasonable value of the goods which were used. *Weitzenkorn*, *supra* at 793-794.

The court awarded $44,600 to plaintiff. Plaintiff's president, Doug Vande Guchte, testified that based on his review of the invoices, plaintiff spent approximately $44,600 for the off-site sand that had been brought in. Feenstra testified that load slips showed plaintiff had brought in $44,600 worth of sand. Feenstra also stated that the price charged by plaintiff, $4.76 per cubic yard, was a reasonable price for the sand. In their reply brief, defendants state that they have never disputed that plaintiff actually paid $44,600 for off-site sand. Under these facts, the trial court did not clearly err in finding that $44,600 was the reasonable cost of the sand. See *LaFond*, *supra*.

Defendants argue that plaintiff should be able to recover no more than $20,706 because that was the amount claimed in its pleadings. This argument is without merit. Plaintiff filed a motion for leave to file an amended complaint, in which it alleged that plaintiff "had to purchase gravel and fill sand from off-site sources having a value in excess of $44,000." Accordingly, defendants had notice that plaintiff was claiming an amount greater than $20,706 as compensation for the sand.

Defendants assert that plaintiff's recovery should not exceed $20,706 because before trial plaintiff was willing to accept that amount as payment for the sand. However, evidence of attempts to compromise a claim which was disputed as to either validity or amount is not admissible to prove the invalidity of the claim or its amount. MRE 408.

Finally, defendants argue that the trial court failed to credit defendant with the payment included in the contract price for on-site sand not used by plaintiff. Defendants maintain that the damages should be reduced by $12,350 because the contract already included the cost of mining the sand. However, because defendants did not preserve this issue by raising it below, we decline to address it. See *Featherston v Steinhoff*, 226 Mich App 584, 592; 575 NW2d 6 (1997).

III

We conclude that the present appeal is vexatious because it was taken without any reasonable basis for believing that there was a meritorious issue to be determined on appeal. See MCR 7.216(C)(1)(a); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). Therefore, pursuant to MCR 7.216(C)(2), we remand to the circuit court for a determination of plaintiff's actual damages and expenses, including reasonable attorney fees incurred in defending against defendants' appeal.

Affirmed. Remanded to the trial court for an award of actual damages and expenses incurred on appeal. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ Mark J. Cavanagh